UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF ALABAMA

In re:

Case No. 01-5334-WRS
Chapter 7

BENJAMIN FRANCIS NOLEN,

Debtor,

CINCINNATI INSURANCE COMPANY,

Plaintiff,

Adv. Pro. No. 03-3137-WRS

v.

BENJAMIN FRANCIS NOLEN, an individual, MARION DANIEL NOLEN, JR., an individual, AND GLENNIS JEROME HARRIS, an individual,

Defendants.

MEMORANDUM DECISION

This Adversary Proceeding is before the Court upon the summary judgment motion of Plaintiff Cincinnati Insurance Company. (Doc. 15). The parties have submitted briefs. (Docs. 15, 16, 19, and 25). The Court heard argument on December 7, 2004. The Court finds that there are genuine issues of material fact in this Adversary Proceeding. See, Fed. R. Civ. P. 56, made applicable to Adversary Proceedings pursuant to Fed. R. Bank. P. 7056. For this reason, the Motion for Summary Judgment filed by Plaintiff Cincinnati Insurance is denied.

I. FACTS

This Adversary Proceeding originated as a civil action in the Circuit Court of Montgomery County, Alabama, and was removed by the Defendants to this Court on November 12, 2003. (Doc. 1). Plaintiff Cincinnati Insurance Company has brought this suit to recover amounts paid under a bond issued to the Bama Wood Profit Sharing Plan and Trust (the "Plan").[1] The Plaintiff claims that it is subrogated to the rights and remedies available to the Plan, which is the insured and has recovered from Cincinnati Insurance under the bond. (Doc. 1). The Plaintiff alleges that the Defendants have committed acts of conversion, intentional interference with business relations, and civil conspiracy against the Plan by the transfer of more than $2,000,000 in Plan assets to Bama Wood, Inc. (the "Company") and others for the benefit of themselves. (Docs. 1 and 16). More specifically, the Plaintiff claims that the alleged wrongful transfers took the form of direct cash transfers, the Company's retention of timber sale proceeds, and the Plan's assumption of debt incurred by the Company. (Doc. 16).

Bama Wood was an Alabama corporation engaged in the business of buying, managing, and operating forest and timber properties. (Doc. 16). The Plan was an employee profit sharing plan that was commenced a short time after the Company began its operations. (Nolen Aff. ¶ 2). The three Defendants in this case, Benjamin Francis Nolen, Marion Daniel Nolen, and Glennis Jerome Harris were former trustees of the Plan and were officers of Bama Wood. All three

[1] As a result of a disagreement between Cincinnati Insurance Company and its insured with respect to the payout of the bond proceeds, litigation ensued in the Circuit Court of Montgomery County, Alabama. On May 5, 2003, the Circuit Court issued a declaratory judgment ruling that the bond was properly payable to the Plan in the amount of $500,000.00. (Doc. 2).

Defendants filed bankruptcy petitions in this Court on August 24, 2001. (Case Nos. 01-5334, 01-5335, 01-5337). Two of the three defendants have received discharges in their respective bankruptcy cases.[2] (Case Nos. 01-5334, 01-5335, Doc. 2). The Plaintiff asserts that liability for the aforementioned acts of the three Defendants is nondischargeable pursuant to 11 U.S.C. § 523(a)(4) (debt is excepted from discharge if incurred by fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny). (Doc. 16).

II. CONCLUSIONS OF LAW

A. Introduction

Summary judgment is proper only when there is no genuine issue of any material fact and the moving party is entitled to judgement as a matter of law. See Fed. R. Civ. P. 56, made applicable to Adversary Proceedings pursuant to Fed. R. Bank. P. 7056; Celotex Corp. V. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2553, 91 L.Ed. 2d 265 (1986); Jones v. City of Columbus, 120 F.3d 248, 251 (11th Cir. 1997). Federal Rule of Civil Procedure 56(c) states the following:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

[2]Defendant Benjamin Nolen filed a Chapter 7 petition on August 24, 2001 and received a discharge on April 12, 2002. (Case No. 01-5334, Doc. 29). Defendant Marion Daniel Nolen filed a Chapter 7 petition on August 24, 2001 and received a discharge on February 15, 2002. (Case No. 01-5335, Doc. 29). Defendant Glennis Jerome Harris filed a Chapter 11 petition on August 24, 2001 and that petition was voluntarily dismissed on December 5, 2002. (Case No. 01-5337, Doc. 67).

Fed. R. Civ. P. 56(c). The facts must be viewed in a light most favorable to the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S.C. 2505, 91 LED. 2d 202 (1986). The Plaintiff contends that there are no genuine issues of material fact that exist in this case. (Doc. 16).

B. Discussion

The Plaintiff's lawsuit is based upon three causes of action; conversion, intentional interference with contractual relations, and civil conspiracy. (Docs. 1 and 16). The Court will address the elements of each cause of action separately.

To sustain a claim of conversion, there must be (1) a wrongful taking; (2) an illegal assertion of ownership; (3) an illegal use or misuse of another's property; or (4) a wrongful detention or interference with another's property. Drennen Land & Timber Co. v. Privett, 643 So.2d 1347, 1349 (Ala. 1994) (citing Gray v. Liberty Nat'l Life Ins. Co., 623 So.2d 1156 (Ala. 1993); Driver v. Hice, 618 So. 2d 129 (Ala. 1993); Gillis v. Benefit Trust Life Ins. Co., 601 So. 2d 951 (Ala. 1992).

The elements of the tort of intentional interference with contractual relations include (1) the existence of a contract or business relation; (2) the defendant's knowledge of the contract or business relation; (3) intentional interference by the defendant with the contract or business relation; (4) absence of justification for the defendants interference; and (5) damage to the

plaintiff as a result of defendant's interference. Bailey v. Allgas, Inc., 284 F.3d 1237 (11th Cir. 2002); Folmar & Associates LLP v. Holberg, 776 So.2d 112, 115 (Ala. 2000).

A civil conspiracy requires a combination of two or more individuals to accomplish an unlawful purpose or to accomplish a lawful end by unlawful means. McLemore v. Ford Motor Co., 628 So.2d 548 (Ala. 1993) (citing Barber v. Stephenson, 69 So.2d 251 (Ala. 1953)).

Plaintiff claims that the Defendant's exercised control over the Plan's assets by transferring funds from the Plan to the Company in the form of direct cash transfers, the Company's retention of timber sale proceeds, and the Plan's assumption of the Company's debt. (Doc. 16). The Plaintiff alleges that these transfers cannot be characterized as directed investments of any sort. (Doc. 16). The Defendant Benjamin Nolen disputes this assertion as being "categorically false." (Nolen Aff. ¶ 6). Defendant Benjamin Nolen alleges that in every instance cash advances from the Plan were adjusted at each year end, treated as capital contribution to the Company and as a directed investment and charged to the individual accounts of the former trustees. (Nolen Aff. ¶ 4).

Plaintiff asserts that the Defendants, in their capacity as former trustees, were solely responsible for the investment, management, disposition and control of the assets. (Doc. 16). However, Defendant Benjamin Nolen asserts that Defendants Marion Daniel Nolen and Glennis Jerome Harris were not tasked, or responsible for any of the decision making associated with the Plan or the preparation of documents. (Nolen Aff. ¶ 4). Defendant Benjamin Nolen also asserted that Marion Daniel Nolen resigned from his full time participation with the Company in the early 1990s. (Nolen Aff. ¶ 4).

Plaintiff cites the deposition testimony of Robert Foster, comptroller of the Company from January 1996 to May 2000, to bolster the argument that Foster was never instructed to document the transfer of funds as directed investments. (Doc. 16). Defendant Benjamin Nolen, in a sworn affidavit, states that he personally directed Robert Foster to adjust year end entries to reflect all payments, transfers or advances, as directed investments. (Nolen Aff. ¶ 6). If this is found to be true, the Plaintiff's case would be undermined.

Plaintiff alleges that the transfers from the Plan to the Company were made for the benefit of the Company and the Defendants themselves. (Doc. 16). The Defendants deny this claim, asserting that no funds from the Plan were used personally by the Defendants. (Nolen Aff. ¶ 7). The Court finds that these are all genuine issues of material facts, thereby precluding entry of summary judgment in favor of the Plaintiff.

Cincinnati Insurance contends that the Defendants have not shown that there are any facts in dispute as they did not submit any depositions, answers to interrogatories or requests for admissions. (Doc. 25). Cincinnati Insurance argues in its reply brief, without any support, that the affidavit of Benjamin Nolen is insufficient. It then launches into a discussion of the universe of evidence that the Defendants did not provide, ignoring the contents of Nolen's affidavit. For all of Cincinnati Insurance's disparagement of the sufficiency of the Defendants' evidentiary showing, they do not argue, indeed cannot convincingly argue, that Benjamin Nolen does not have first hand knowledge of the facts asserted. In effect, Cincinnati Insurance asks the Court to make a credibility determination in their favor and disregard Benjamin Nolen's affidavit.

The District Court has stated the following when considering a motion for summary judgment:

> All the evidence and the inference from the underlying facts must be viewed in the light most favorable to the non-movant. [citations omitted] The movant bears "the exacting burden of demonstrating that there is no dispute as to any material fact in this case." [citations omitted] When the court considers a motion for summary judgment, it must avoid weighing conflicting evidence, making credibility determinations and deciding material factual issues.

Quillen v. American Tobacco Company, 874 F.Supp. 1285, 1292 (M.D. Ala. 1995). The Court rejects the argument of Cincinnati Insurance as its motion rests on the assumption that Benjamin Nolen is not credible. Disputes such as this are the stuff of which trials are made.

On November 16, 2004, the Court entered an order specifically requesting that the parties address the question of whether the Plaintiff's claims have discharged. (Doc. 22). As two of the three Defendants, Benjamin Nolen and Daniel Nolen have received discharges in individual bankruptcy cases, the question immediately arises whether the claims against the Nolens have been discharged. This issue appears to have been raised in the Notice of Removal (Paragraphs 7-9), but was not discussed by the parties in the briefs on the motion for summary judgment. At this point the record is not sufficiently clear to permit the Court to dispose of this issue at this time. The question of whether the Nolens discharged their indebtedness to Cincinnati Insurance is still unresolved.

As there are material facts in dispute, the motion for summary judgment filed by Cincinnati Insurance is DENIED. The Court will enter judgment by way of a separate document.

Done this 15th day of December, 2004.

/s/ William R. Sawyer
United States Bankruptcy Judge

c: Von Memory, Attorney for Defendants
Tom Burgess
Scott W. Gosnell, Attorneys for Plaintiff
Teresa Jacobs, Bankruptcy Administrator